

**SKAGIT RIVER BASIN
INSTREAM FLOW IMPLEMENTATION AGREEMENT
between**

SKAGIT COUNTY

and

**THE STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY**

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Contract # C20070060

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I - RECITALS

1.1 This Agreement is made and entered into by and between Skagit County and the State of Washington Department of Ecology ("Ecology"), pursuant to Chapter 39.34 RCW, the Interlocal Cooperation Act, Skagit County Resolution No. 07-R0041 adopted by the Skagit County Board of Commissioners on January 22, 2007, and the Settlement Agreement between Ecology and Skagit County relating to the Lower and Upper Skagit River Instream Flow Rule, Chapter 173-503 WAC ("Instream Flow Rule"), entered into on May 15, 2006, and amended on December 19, 2006, ("Settlement Agreement"), which as amended is attached hereto and incorporated by reference.

1.2 On May 15, 2006, Ecology adopted amendments to the Instream Flow Rule. The Instream Flow Rule amendments established groundwater withdrawal limits for permitted and permit-exempt water uses junior to the April 14, 2001 priority date of the Instream Flow Rule. The Instream Flow Rule amendments also included provisions for mitigation for groundwater withdrawals and other water resource management provisions.

1.3 The Settlement Agreement related to ongoing actions by Skagit County and Ecology to implement the amended Instream Flow Rule and manage water resources in Skagit County.

1.4 Ecology is authorized to administer and enforce Washington State's water resource laws and rules, including the Instream Flow Rule. Skagit County is a general purpose local government with plenary powers over land use in unincorporated Skagit County, including water availability decisions for the subdivision of land under Chapter 58.17 RCW, and the issuance of building permits under Chapter 19.27 RCW. Skagit County's rights and responsibilities with respect to implementing the Instream Flow Rule are specified in RCW

90.54.090. Skagit County and Ecology seek to exercise their respective regulatory authority in a coordinated and complementary fashion.

II - DEFINITIONS

For purposes of this Agreement, the term --

2.1 "Affected Indian Tribe" means any Indian tribe, band, nation, or community that is federally recognized by the United States Secretary of the Interior and that will or may be affected by a development proposal.

2.2 "Flow Sensitive Basin" is defined in Chapter 14.24 SCC. Flow Sensitive basins are generally consistent with the definition of sub-basin management units in WAC 173-503-025 and 173-503-074 with the exception of the lower middle and upper-Skagit sub-basin management units.

2.3 "Implementing Ordinances" means those ordinances adopted or amended by Skagit County to implement the Instream Flow Rule, namely chapters 12.48, 14.06, and 14.24 Skagit County Code ("SCC").

2.4 "Instream Flow Rule" means the Lower and Upper Skagit River Instream Flow Rule, Chapter 173-503 WAC.

2.5 "Major Development Proposal" means a Development Application filed with Skagit County for which public notice is required pursuant to SCC 14.06.150 and for which a Notice of Decision is required pursuant to SCC 14.06.200.

2.6 "Sub-basin Management Unit" is the area used to describe where a water reservation applies, as defined in WAC 173-503-025.

2.7 "Water Availability Determination" means a determination by Skagit County whether water is available for the issuance of a building permit under RCW 19.27.097, or for the subdivision of land under RCW 58.17.110.

2.8 "Water Reservation" means the quantity of water available for a specific Sub-basin Management Unit, outlined in Chapter 173-503 WAC and is synonymous with the term "groundwater withdrawal limit" in the implementing ordinances.

III - PUBLIC NOTICE, TRACKING AND REPORTING

3.1 Notice of Development Applications and Decisions. Skagit County will provide public notice of receipt of each Major Development Proposal, and will provide public notice of each decision on a Major Development Proposal.

3.2 Development Activities in Skagit River Basin. Skagit County will provide electronic notification to Ecology and internet notice on its website of each application for a subdivision, short subdivision or building permit for a new residential dwelling unit in the Skagit River Basin in Skagit County that requires a water availability determination and each approval of such an application.

3.3 Ecology Water Right Decisions. Ecology will track well start cards, well logs, water right permit applications, water right permit decisions, water right certificates and approved mitigation plans within Skagit and Snohomish Counties. Ecology will provide notice to Skagit County and on its website of each application for a water right permit, and of application decisions.

3.4 Water Use Estimates and Data Reconciliation. Skagit County, in cooperation with Ecology, will prepare water use estimates for each development proposal. Ecology and Skagit County will meet periodically as necessary to reconcile water use estimates based on well start cards, well logs and state water right and county land use and building permit applications and decisions. Based on the County's water use estimates, as reconciled with Ecology and County permit data, Ecology, in cooperation with Skagit County, will determine the amount of water remaining in each reservation.

3.5 Tracking Development Activities. Skagit County, in cooperation with Ecology, will establish and maintain an electronic database for applications and approvals for all subdivisions, short subdivisions and building permits, segregated water availability determination requests and water availability determination conclusions by each subbasin management unit. The data base will include the County's estimate of water use for each development proposal. Skagit County will provide a summary report from the data base to Ecology annually and otherwise upon request.

3.6 Coordinated Water System Plan Consistency Review. Skagit County, in consultation with Ecology, Skagit Basin water purveyors, affected Indian tribes and other interested parties, will review the Skagit County Coordinated Water System Plan and, if necessary, will update the plan as appropriate and consistent with existing laws to ensure consistency between the plan, the Skagit Instream Flow Rule and Skagit County implementing ordinances, this Agreement and the Settlement Agreement.

IV - CONSULTATION AND PUBLIC INFORMATION

4.1 Annual Review. By February 15 of each year, Skagit County and Ecology will meet for the purpose of reviewing a preliminary annual report showing water use estimates for the previous year and the estimated amount of water available under reservation limits in each subbasin management unit.

4.2 Ecology Annual Report. Ecology will issue an annual report by March 1 of each year and will publish public notice of the availability of the annual report on its internet web site and in a newspaper of general circulation for the region. The annual report will include estimates developed under Section 3.4 of the amount of water that has been allocated from the reservation for each subbasin management unit, and the amount of water that remains available for allocation,

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and will identify any subbasin management units that are closed, and any subbasin management units that are reopened based on the approval of a mitigation plan. Ecology also will include in the annual report updated estimates of the use of water from stockwater and agricultural irrigation reservations in the Instream Flow Rule.

4.3 Consultation With Interested Parties. Skagit County and Ecology will consult with Skagit Basin water purveyors, affected Indian tribes, and other interested parties to discuss the annual report before Ecology issues its annual report for the previous year.

V - WATER RESOURCES ADMINISTRATION

5.1 Water Right Processing. The water reservation limits in the Instream Flow Rule are available for both permit-exempt groundwater uses and permitted water uses. To prevent conflicts between senior water right applications and junior permit-exempt uses, and establish certainty for water supply and mitigation planning, Ecology will process with all due diligence all pending applications on file with Ecology as of the date of this agreement for water rights in the Nookachamps Creek-Upper, Nookachamps Creek - East Fork, and Carpenter/Fisher Creek basins. Ecology will maintain a goal of completing this processing on or before December 31, 2007. Ecology's ability to meet this water rights processing target date is subject to adequate water rights processing staff levels in the Ecology Northwest Regional Office Water Resources Section, taking into account legislative funding and other demands on staff such as appeals of water right decisions or other legal action. The parties acknowledge that the processing target date of December 31, 2007, is a goal and has no legal significance if unmet or adjusted. The parties further acknowledge that failure to meet this target date does not constitute a violation of this Agreement.

5.2 Basin Closures. Based on a review of the information and reports described in Part III of this Agreement, Ecology will determine when a reservation limit has been fully utilized and is therefore subject to closure pursuant to WAC 173-503-051. Ecology also will review information and reports to determine if closed subbasins may be reopened. Before closing or reopening any subbasin, Ecology will consult with Skagit County on such actions. The public will be informed of any such closure or reopening through publication of a notice on the Ecology and County websites and in a newspaper of general circulation in the effected County. Upon a basin closure, any land use or building permit application requiring a determination of water availability will be approved by Skagit County only if the applicant satisfies the mitigation requirements of the Skagit County Code, the Instream Flow Rule, and other applicable law.

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5.3 Skagit County Water Resource Advisory Committee. Skagit County will establish an advisory committee on the use of water under the Skagit River mainstem and sub-basin management units, and on other water resource issues in the Skagit River basin. Skagit County will include on the Advisory Committee representatives from Skagit Basin water purveyors, local governments and special purpose districts, affected Indian tribes, and other interested parties. Skagit County will establish the Water Resource Advisory Committee by July 1, 2007. Ecology will participate on the Advisory Committee as an observer, and will provide technical assistance to the committee on policy and technical issues associated with implementation of the Instream Flow Rule on request. Ecology will seek input from the Advisory Committee on the allocation of water from the mainstem and tributary water reservations and the processing of water right applications in the Skagit River basin.

5.4 Water Resource Technical Assistance. Skagit County and Ecology will jointly conduct a technical assistance program and will develop and distribute educational and technical assistance materials on the Instream Flow Rule. Skagit County and Ecology will ensure that all personnel involved in providing educational and technical assistance, and recordkeeping and reporting under this Agreement are adequately trained to understand relevant state and local regulatory requirements.

5.5 Enforcement. Ecology will inform Skagit County prior to initiating enforcement action relating to Chapter 173-503 WAC or Chapters 90.03 and 90.44 RCW unless relating to an immediate public health and safety issue. Skagit County is responsible for enforcement actions relating to county implementing ordinances, including its critical areas ordinances, Chapter 14.24 SCC, and drinking water code, Chapter 12.48 SCC.

VI - INSTREAM FLOW RULE IMPLEMENTATION

6.1 Funding to Skagit County for Instream Flow Rule Implementation. Ecology will seek \$150,000 of funding through its agency budget submitted to the Governor and Legislature for funding for state fiscal year 2008, to offset the necessary one-time costs incurred to implement the Instream Flow Rule, as outlined in the Settlement Agreement. If funding opportunities arise before July 1, 2007, Ecology may fund some of these costs before the agreed-upon date in the Settlement Agreement.

6.2 Hydrologic Studies. Skagit County and Ecology are jointly funding a study by the United States Geological Survey of groundwater in the Skagit River Basin ("USGS Study"). The objectives of the USGS Groundwater Study are described in the Settlement Agreement. Skagit County, Ecology, and permit applicants may also develop hydrologic studies that could be used to support specific development proposals, water right applications, or mitigation plans.

6.3 Maps and Map Revisions. The boundaries of the Skagit River Basin and tributary subbasins have been mapped and maps will be updated as new information becomes available through the USGS Study or other scientifically-sound hydrologic studies, pursuant to WAC 173-503-116 and -120. Skagit County also will prepare and update flow sensitive basin groundwater maps pursuant to Skagit County Code 14.24.050 and .380. Such groundwater maps and map revisions will be used by Skagit County in making a water availability determination. Skagit County and Ecology shall seek to reconcile any differences between subbasin delineations.

6.4 Transboundary Streams. Skagit County will meet with Snohomish County and negotiate an equitable apportionment between the two counties of the subbasin reservation for the Fisher/Carpenter Creek subbasin management unit. Ecology will provide information and consultation to the negotiating parties, and participate as necessary in the negotiations between the two local governments. Ecology and Skagit County will work with Snohomish County to develop a process to track and report water use in both counties. In the event that agreement on the apportionment of the reservation cannot be reached, Ecology will equitably apportion the reservation between the two counties.

VII - MITIGATION PLANNING

7.1 Mitigation Plan Guidelines. Mitigation plans may be developed for individual projects, for multiple projects in a reach or all of a tributary subbasin pursuant to WAC 173-503-060(c). Mitigation plans may be developed by project applicants, Skagit County or any other person or entity that has demonstrated interest and expertise in either water resource management or protection of aquatic habitat. Ecology, in cooperation with Skagit County, will develop guidelines for development and approval of mitigation plans, consistent with state law and local ordinances.

7.2 Mitigation Plan Approval. Upon receipt of a land use application requiring a water availability determination that includes a mitigation plan, Skagit County will forward the proposed mitigation plan to Ecology for review, comment and approval. Skagit County may determine that water is available conditioned on approval by Ecology and Skagit County and implementation of a mitigation plan.

7.3 Hydraulic Continuity Review Criteria. Each non-mitigated withdrawal with a priority date junior to instream flows will be debited from the corresponding reservation quantities by an amount equal to the amount withdrawn, or the standard withdrawal amount established in WAC 173-503-073(7)(b), less allowable return flow credit, unless information from the U.S. Geological Survey investigation or other scientifically-sound investigations indicate the degree of effect on the surface water body from the withdrawal is

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less than the withdrawal amount or the standard withdrawal quantity established in WAC 173-503-073(7)(b). In the later case, only the amount of surface flow reduction will be debited from the respective reservation quantity.

VIII - PRIOR AGREEMENTS

8.1 Settlement Agreement. Skagit County and Ecology have reviewed the Settlement Agreement entered by the parties on May 16, 2006, as amended on December 19, 2006, and intend this Agreement to provide specific details on the commitments made in the Settlement Agreement to implement the Skagit Instream Flow Rule. The Settlement Agreement remains a binding and enforceable agreement between Skagit County and Ecology and is hereby incorporated by reference into this Agreement. In the event of a conflict between the Settlement Agreement and this Agreement, and except as otherwise explicitly provided in this Agreement, the Settlement Agreement will control.

8.2 Document Sharing Agreement. Skagit County and Ecology have agreed to mutually implement the Skagit Instream Flow Rule and, through the Settlement Agreement, to mutually defend implementing actions, and have entered into a Document Sharing Agreement to facilitate, to the extent consistent with existing law, these cooperative efforts. The Document Sharing Agreement remains a binding and enforceable agreement between Skagit County and Ecology and is hereby incorporated by reference into this Agreement.

8.3 1996 Memorandum of Agreement. The parties hereby reaffirm the 1996 Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes ("1996 MOA").

IX - GENERAL PROVISIONS

9.1 Dispute Resolution for Skagit County Water Availability Determinations. Ecology and Skagit County agree that, prior to filing any appeal or other action seeking judicial review of the Instream Flow Rule, any of the agreements or county ordinances to implement the Instream Flow Rule, Ecology and Skagit County would submit the matter to dispute resolution as provided in the Settlement Agreement. This provision applies to all appeals or other actions seeking judicial review related to the rule, the rule amendments, County implementing ordinances, the interagency agreement and the settlement agreement, except for water availability decisions.

Water availability decisions by Skagit County may be appealable under the Land Use Petition Act, Chapter 36.70C RCW, ("LUPA"). Because LUPA requires appeals to be filed with 21 days of the issuance of the decision, a meaningful dispute resolution process prior to the deadline for filing a LUPA appeal may not be possible. In the event Ecology files a LUPA appeal of a water availability

determination by Skagit County, the parties agree to jointly seek a stay of the LUPA appeal to conduct dispute resolution under this Agreement.

9.2 Venue. Except for appeals under the Land Use Petition Act described in section 9.1 or as otherwise provided by existing law, in the event that dispute resolution as provided under this Agreement or the Settlement Agreement is unsuccessful, venue for judicial review shall be in Thurston County Superior Court.

9.3 Other Laws Not Affected. This Agreement shall not be interpreted or applied in a manner inconsistent with existing laws and ordinances of Skagit County, including but not limited to Chapter 36.70A RCW, Chapter 19.27 RCW, Chapter 58.17 RCW, and the Skagit County Code. This Agreement shall not be interpreted or applied in a manner inconsistent with existing laws and regulations of the State, including but not limited to Chapter 90.03 RCW, Chapter 90.44 RCW, Chapter 90.54 RCW, Chapter 43.27A RCW, and Chapter 173-503 WAC.

9.4 Amendment. This Agreement may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personal authorized to bind each of the parties.

9.5 Termination. Either party may terminate this Agreement upon 30 days prior written notification to the other party. If this Agreement is so terminated, the parties shall be liable only for performance rendered or costs incurred in accordance with the terms of this Agreement prior to the effective date of termination.

9.6 Waiver. A failure by either party to exercise its rights under this Agreement shall not preclude that party from subsequent exercise of such rights and shall not constitute a waiver of any other rights under this Agreement unless stated to be such in a writing signed by an authorized representative of the party and attached to the original Agreement.

9.7 Severability. If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, if such remainder conforms to the requirements of applicable law and the fundamental purpose of this Agreement, and to this end the provisions of this Agreement are declared to be severable.

9.8 All writings contained herein. This Agreement and the Settlement Agreement contain all the terms and conditions agreed upon by the parties. No other understandings, oral or otherwise, regarding the subject matter of this Agreement shall be deemed to exist or to bind any of the parties hereto.

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IN WITNESS WHEREOF, the parties have executed this Agreement.

State of Washington Department of Ecology

Skagit County *Approved Jan. 22, 2007*

BOARD OF COUNTY COMMISSIONERS
SKAGIT COUNTY, WASHINGTON

Jay Manning
Jay Manning, Director

Sharon D. Dillon
SHARON D. DILLON, Chair

Date:

Don Munks
DON MUNKS, Commissioner

Kenneth A. Dahlstedt
KENNETH A. DAHLSTEDT,
Commissioner

Approved as to form only:

ROB MCKENNA
Attorney General

Approved as to form only:

By: *Dr. Frah*
Assistant Attorney General

Approved as to form:
By: *m. m. De*
Deputy Prosecuting Attorney

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Approved as to Indemnification:

Billie Kadrmas
Billie Kadrmas, Risk Manager

Attest:

Approved:
Trisha Logue
Trisha Logue, Budget/Finance

By: *Linda Hammons* Acting
Joanne Giesbrecht, Clerk of the Board